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# The Sin of Omission: Inaction as Action Under Section 102(2)(C) of the National Environmental Policy Act of 1969

ARTHUR F. FERGENSON\*

The National Environmental Policy Act of 1969<sup>1</sup> (NEPA or the Act) requires in Section 102(2)(C) that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action . . ."<sup>2</sup> The statement, now universally referred to as the "environmental impact statement" (EIS), must contain a detailed analysis of the adverse environmental impacts of the action, the ir retrievable commitment of resources to any such action, alternatives to the proposed action, and the relationship between the environment and economic productivity.<sup>3</sup> The statute further requires that the statement must be prepared in consultation with federal agencies other than the one preparing the EIS, and that the President, the Council on Environmental Quality<sup>4</sup> and the public shall have available the statement and the comments of the other agencies as the proposal for agency action wends its way through agency review processes.<sup>5</sup>

This Article focuses on only a few of the hundreds of cases that have construed the EIS requirement. These cases concern the duty of an agency to prepare an EIS when the only alleged §102(2)(C) activity has been federal regulatory inaction in the face of some environmentally affecting private activity.<sup>6</sup> Defining inaction as action requires courts to engage in judgments

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<sup>1</sup>42 U.S.C. §§ 4321-4347 (1970 & Supp. V. 1975).

<sup>2</sup>42 U.S.C. § 4332(c)(i) (1970).

<sup>3</sup>42 U.S.C. § 4332(c)(ii) and (iv) (1970).

<sup>4</sup>The Council on Environmental Quality was established by Congress in Title II of NEPA. A part of the Executive Office of the President, the Council is given a broad mandate in § 204 of the Act to review, observe, and advise on matters of environmental concern.

<sup>5</sup>The introduction to this article closely tracks language in dozens of cases and other articles on NEPA and the EIS requirement. The language is necessary but derivative; it is the "Rule One" of the EIS analysis. *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967). Hereafter, the standard to be applied would at least comprehend *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936), if not the more rigorous requirements elucidated in *Cuno Eng'g. Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 91 (1941).

<sup>6</sup>Such as, for example, when the Secretary of the Interior refuses to act to prevent the hunting of wolves under an Alaskan state program. See text accompanying notes 53-61 *infra*.

which are of necessity arbitrary because they require a court to determine the weight to be given to environment concerns in a regulatory scheme. The very process of determining whether or not the agency has "engaged" in inaction threatens to upset the "delicate balance" between court supervision and agency participation in the administrative process.<sup>7</sup> Finally, this approach to governmental inaction is fundamentally at odds with notions of the place of government in our society, identifying as it does the government as the source of all rights and privileges; the distortion of the relationship of individual and government thus introduced merits critical examination.

#### DEFINING FEDERAL ACTION

##### *Federal Action Apart From Agency Inaction*

NEPA requires that a federal agency prepare an EIS before it proposes a major federal action significantly affecting the environment.<sup>8</sup> Major federal actions have included the construction of a federal detention facility in Manhattan,<sup>9</sup> the termination of contracts to purchase helium,<sup>10</sup> the issuance of a permit under the Rivers and Harbors Act of 1899 to construct a water canal,<sup>11</sup> the contracting for the supply of electric power to a manufacturing facility to be built,<sup>12</sup> the construction of a federal aid highway,<sup>13</sup> the licensing of public lands for grazing under the Taylor Grazing Act,<sup>14</sup> the licensing of commercial use of plutonium as a nuclear fuel,<sup>15</sup> the abandonment of a downtown Main Post Office and concomitant construction of a new postal facility outside of the city,<sup>16</sup> and the issuance of a permit for a discharge facility for a thermal pollutant, the walls of same facility to intersect a surfing site "whose prime importance is that it is extremely well suited for teaching surfing to beginners."<sup>17</sup>

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<sup>7</sup>Mr. Albee's play is instructive of the fragility of systems of association built upon highly structured and artificial principles; the relationship between courts and administrative agencies are based on such constructs and could hardly fail to be so, given their nature as institutions. Although the consequences to the courts and agencies, only derivatively involving the human actors animating those institutions, should be less severe than in the case of Tobias and family, the effects of a violation of such principles will indeed touch all who depend upon (or cherish) the proper tensions which exist in the federal system. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 109-43 (1976).

<sup>8</sup>42 U.S.C. § 4332(c) (1970).

<sup>9</sup>*Hanly v. Kleindienst*, 471 F.3d 832 (2d Cir. 1972) (Hanly II), *cert. denied*, 412 U.S. 908 (1973).

<sup>10</sup>*National Helium Corp. v. Morton*, 486 F.2d 995 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

<sup>11</sup>*Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Ca. 1975).

<sup>12</sup>*Port of Astoria v. Hodel*, 8 E.R.C. 1156 (D. Ore. 1975).

<sup>13</sup>*Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dept.*, 446 F.2d 1013 (5th Cir. 1971).

<sup>14</sup>*Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), *aff'd* 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976).

<sup>15</sup>*Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 9 E.R.C. 1415 (1976).

<sup>16</sup>*City of Rochester v. United States Postal Serv.*, 541 F.2d 967 (2d Cir. 1976).

<sup>17</sup>*Mehelona v. Hawaiian Elec. Co.*, 418 F. Supp. 1328, 1332 (D. Hawaii 1976). Although the court declined to issue an injunction against further construction of the discharge facility, the

In the standard NEPA case the contested activity could not commence without the financial support or prior approval of a federal agency or department. In some situations, such as in building a new post office or a federal office building, the federal agency takes the action on its own behalf.<sup>18</sup> In other cases, prior federal approval is necessary for activities that are principally designed to enhance private interests, but which the Congress has determined may not go forward without the express approval (through a license or permit) of a federal instrumentality.<sup>19</sup> Finally, there are those cases where the private activity could go forward without federal approval, but cannot, as a practical matter, proceed without federal money; the resulting "partnership" must, therefore, under NEPA, be preceded by an investigation into the environmental consequences of such an arrangement.<sup>20</sup> In all these cases there is a common thread: the federal government is an indispensable party to the activity which is to be undertaken; without some affirmative step by a federal agency the enterprise cannot go forward.

There are circumstances where the federal touch is so light, or the relationship between federal approval or support and the private activity which is to commence so tenuous, that the courts have viewed the action as not sufficiently federal to compel preparation of an EIS. *City of Boston v. Volpe*<sup>21</sup> is such a case. There, the Massachusetts Port Authority determined to build an Outer Taxiway at Logan Airport (an Inner Taxiway had previously been constructed with federal aid) and sought money for the project from the Federal Aviation Administration (FAA).<sup>22</sup> The FAA made a "tentative allocation" of funds to the project, but withheld final approval pending preparation and circulation of an EIS. The Port Authority, meanwhile, awarded a contract for construction and actually had such construction commence, all without assurance of the federal money. The court refused to enjoin continued construction of the Outer Taxiway, holding that the project had not become federalized under NEPA merely through the expectancy of federal funds; the Port Authority, after all, began construction at its own risk, as it was entitled to, "wholly independently of the federal government."<sup>23</sup> Nor did the tailoring of the project to federal standards transform it into a federal activity.<sup>24</sup>

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Hawaiian Electric Company, from whose plant the heated water gushed, pledged to construct a surfing site near the original one, or, if such was not possible, to improve surfing opportunities elsewhere along this coast of Oahu. *Id.* at 1338 & n.21.

<sup>18</sup>See note 16 *supra*.

<sup>19</sup>See notes 11, 14, 15, & 17 *supra*.

<sup>20</sup>See note 13, *supra*.

<sup>21</sup>464 F.3d 254 (1st Cir. 1972).

<sup>22</sup>The court states that the FAA "gave its general approval to the Port Authority's Airport Layout Plan to construct an Outer Taxiway . . ." *Id.* at 256, but does not otherwise define what this "general approval" consisted of, nor does the court again refer to this "general approval" in its subsequent analysis of the allegedly "federalizing" actions of the FAA or the Port Authority. The Port Authority initiated the grant application procedure by "request" to the FAA one year after the "general approval" was given. *Id.*

<sup>23</sup>*Id.* at 259 (footnote omitted).

<sup>24</sup>But *cf.*, *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942) (California courts wrongly held that Army post exchanges were not "the government of the United States or any department

*City of Boston* was a funding case and did not, on its face, involve any federal agency in enforcement or prohibition with regard to non-federal activity: the sole involvement of the federal government was to *not* involve itself in the funding of a project that the state had full power to undertake.<sup>25</sup> In that sense, *City of Boston* is nothing more than a timing case: it demarks a point in time when the involvement of the government is not sufficiently mature to cause an action, which is otherwise in the full flower of its project-hood, to be federal.<sup>26</sup> The line may be difficult to draw<sup>27</sup> but at least the First Circuit drew it so the NEPA fell on the other side.<sup>28</sup>

Financial assistance for a project from the federal government, even when accepted, may not alone be sufficient to federalize it for purposes of NEPA. In *Carolina Action v. Simon*,<sup>29</sup> the court focused on the extent to which the federal government had affirmatively involved itself in the support of an environmentally-impacting program. The court there held that receipt of federal revenue sharing funds did not federalize the construction of county and municipal buildings for which such funds were being used so as to require the disbursing authority (the Secretary of the Treasury) to file an EIS. This was so even though the grant of revenue sharing funds "contemplate[s] federal control at several stages," a control which extends to the nature of the projects for which the funds may be used.<sup>30</sup> Although, unlike *City of Boston*, the federal money was present, there was insufficient involvement by the federal government in determining its use, or, at least, the involvement was not sufficiently particularized as to the nature or desirability of the project at

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thereof," that being the operative language of exemption by state statute from a state imposed tax on motor vehicle fuel).

<sup>25</sup>The case differs, therefore, from the inaction line of cases where the federal involvement is not within the control of the non-federal actors; as we shall see, in the funding cases the federal government stands off to one side ready to help, whereas in the inaction cases with which this Article is principally concerned the federal government hovers above the private activity ready (maybe) and able (possibly) to swoop down and halt the exorable flow of the non-federal effort.

<sup>26</sup>The question of when a state project becomes federalized is distinct from the issue of the timing of the preparation of an EIS for a concededly federal action. The state activity may be well past the "proposal" stage, as in *City of Boston*, before federalization triggers the EIS requirement. On the other hand, a matter may be fully federalized but not yet be a "proposal" for purposes of NEPA. See *Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 319-22 (1975) (SCRAP II).

<sup>27</sup>See, e.g., cases collected in *Scottsdale Mall v. Indiana*, 549 F.2d 484, 488 (7th Cir. 1977), dealing with federal aid highways.

<sup>28</sup>Once a project is federalized it may be difficult, if not impossible, to remove, for EIS preparation purposes, the stain of federal agency involvement. See 549 F.2d at 489. That highway segment, that group of housing units, that shopping mall shall everafter carry the mark of Cain: an EIS to create and an EIS to destroy. *National Helium Corp. v. Morton*, 486 F.2d 995 (10th Cir. 1973), cert. denied, 416 U.S. 993 (1974); *City of Rochester v. United States Postal Service*, 541 F.2d 967 (2d Cir. 1976). "Therefore whosoever slayeth Cain, vengeance shall be taken on him sevenfold." *Genesis* 4:15. The first reference to the concept of multiple damages.

<sup>29</sup>389 F. Supp. 1244 (W.D.N.C.), aff'd, 522 F.2d 295 (4th Cir. 1975).

<sup>30</sup>*Id.* at 1248-49. See 31 U.S.C. § 1222(a) (1970). The construction of a county judicial building and a city hall would presumably fall within that category of "priority expenditures" defined as "ordinary and necessary capital expenditure authorized by law."

issue.<sup>31</sup> But, again, the analysis is in terms of nexus: whether or not the federal agency is sufficiently supportive of and involved in the project for it to be considered a partner, with the responsibilities (environmental) as well the benefits (controlling the remaking of the face of America) to be derived therefrom.<sup>32</sup>

### *Agency Inaction as Federal Action*

While the line is hazy and the land of gray may be rich with delicious ambiguities<sup>33</sup> the issue with which this article is principally concerned, is whether federalization may be accomplished by nonintervention of the regulatory authority in a matter which, apart from nonintervention, is entirely private, that is, which has no federal sponsorship which meets the NEPA requirements of money and/or control and which required no federal authorization before it commenced.

The first case to hold, at least impliedly, that inaction is action under NEPA was *Students Challenging Regulatory Agency Procedures v. United States (SCRAP I)*.<sup>34</sup> *SCRAP I* construed the then—section 15(7) of the In-

<sup>31</sup>Representing the extreme case exemplified by *Carolina Action v. Simon* would be John Beresford Tipton, "The Millionaire."

<sup>32</sup>The district court contributes to the discussion with which this Article concludes, by observing that the accumulated substantive and procedural wisdom on the environment does not rest solely with the federal government, an observation taken in the face of NEPA's broad statement of policy. 42 U.S.C. § 4331 (1970). The court states that with regard to projects financed through revenue sharing the lack of consideration of the "protections embodied in NEPA . . . is the inevitable result of a program to extend to the state and local governments the responsibility for their own development and the opportunity to pursue and resolve their own perceived objectives and problems, including environmental concerns." 389 F. Supp. at 1250.

<sup>33</sup>One case that seems to share characteristics of both the cases discussed above, and the federal inaction cases discussed below is *Friends of Yosemite v. Frizzell*, 10 E.R.C. 1159 (N.D. Cal. 1976). This was a suit against, *inter alia*, federal administrators of Yosemite National Park and the exclusive franchisee (a private corporation) for operation of tourist accommodations and services at the Park. Plaintiffs claimed that an EIS should have been prepared before the franchisee began a major promotional campaign to increase tourism in the Park. Without detailing terms of the franchise agreement the court found that publicity was "not subject to formal review or authorization by the Park Service," although in certain unusual circumstances copy was "present[ed]" to the Superintendent of the Park "on an informal basis." *Id.* at 1163. On these facts the court held that, for NEPA purposes, a nexus between federal and state activity did not exist with regard to the advertising. *Id.* at 1163-64. The analysis was done solely in "nexus" language. In so doing, the court relied principally on a Ninth Circuit decision restricting the NEPA reach of federal sponsorship of certain airport modifications and improvements into other state-funded airport projects on the ground that the former and latter were "not so closely interwoven . . . to make the entire airport development program the relevant 'action' for NEPA purposes." *Friends of the Earth v. Coleman*, 8 E.R.C. 1617, 1619 (9th Cir. 1975). To the extent, however, that it was possible, under the franchise agreement or otherwise, for the National Park Service to intervene and cause the cessation of specific advertising campaigns or alteration of specific copy, the issue becomes one of inaction/action: even assuming that the activity is privately initiated and is not directly sponsored, approved, or supported by the federal government, does the power, in some circumstances, to halt or curtail the activity constitute, even so long as that power remains unexercised, federal action for purposes of NEPA?

<sup>34</sup>346 F. Supp. 189 (D.D.C. 1972) (three judge court).

terstate Commerce Act,<sup>35</sup> which empowered the Interstate Commerce Commission (ICC) to suspend and investigate rates filed by railroads on 30-days notice under section 16(3) of the Act. A suspension could not continue more than seven months<sup>36</sup> following the date on which the rates would otherwise have gone into effect, even if the investigation were not yet completed. In *SCRAP I*, the ICC did not suspend a 2.5 percent surcharge filed by the nation's railroads to apply across-the-board to freight rates. The district court held that this refusal to suspend constituted a major federal action significantly affecting the environment requiring the preparation of an EIS, and preliminarily enjoined the ICC "from permitting the railroads to collect the surcharge" until a proper EIS had been issued.<sup>37</sup> The district court substituted silence for analysis, relying on one case for the proposition that now was the proper point in time for the preparation of an EIS, without ever even stating the issue as to whether the imposition of the surcharge was a federal, as opposed to a private, action.<sup>38</sup> The Supreme Court reversed, *United States v. SCRAP*, (*SCRAP I*), on other grounds,<sup>39</sup> reserving decision on the issue of whether an EIS is "required at the suspension stage of a rate proceeding,"<sup>40</sup> while stating that the suggestion to the railroads by the Commission of an expiration date for the surcharge and the "other standard conditions attached to the Commission's refusal to suspend the surcharge did not, in any meaningful sense, transform the carrier-made rate into a Commission-made rate."<sup>41</sup>

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<sup>35</sup>49 U.S.C. § 15(7) (1970). By Pub. L. 94-210, 90 Stat. 36 (1976), § 15(7) was amended so as not to apply to railroad rate changes. A new § 15(8) was added to apply to railroads. 49 U.S.C.A. § 15(8) (Supp. 1977). The possible suspension period was increased from seven to ten months if a report is filed with Congress by the ICC under § 15(8)(a). Certain new limitations were placed on the power of the Commission to suspend rate changes, §§ 15(8)(b), (c), and (d), which limitations may reflect a Congressional policy that the normal course of affairs is for the Commission *not* to suspend, and thus, *not* to act—for which no justification, under NEPA or otherwise, is required.

<sup>36</sup>Now ten months, *see* note 35, *supra*.

<sup>37</sup>346 F. Supp. at 192.

<sup>38</sup>*See id.* at 199-200.

<sup>39</sup>The injunction issued by the district court was held to be an improper "interference with the Commission's discretionary decision whether or not to suspend the rates." 412 U.S. at 692. Until the Commission "had finally determined the lawfulness of the rates" the courts lacked the power to grant injunctive relief against their effect. *Id.* at 691; *Arrow Transp. Co. v. Southern Ry. Co.*, 372 U.S. 658 (1963).

<sup>40</sup>*Id.* at 698-99 n.22.

<sup>41</sup>*Id.* at 693 n.17. The Supreme Court has not directly answered the question whether the decision not to suspend under § 15(7) must be preceded by an EIS. In *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976), though, the Supreme Court may well have eliminated the possibility that such a requirement could be imposed. *Flint Ridge* dealt with the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1720 (1976), which provides that a statement of record filed as required under the Act by a private developer as to unimproved tracts of land to be sold in interstate commerce, is effective 30 days after filing unless suspended within that time by the Secretary of Housing and Urban Development. Suit was brought to compel the preparation of an EIS before the Secretary could permit the statement of record to become effective. The district court held that the non-suspension of a statement of record was a federal action, taking its cue explicitly from *SIPI*. *Scenic Rivers Ass'n v. Lynn*, 382 F. Supp. 69, 74 (E.D.

The first statement that NEPA requires the preparation of an EIS for federal inaction appeared as dictum in *Scientists' Inst. for Pub. Infor., Inc. v.*

Okla. 1974). The Court of Appeals affirmed, relying on three prior approval cases (one ratification and two licences) for its holding that the non-use by a federal agency of a power to suspend the effectiveness of a private action, constituted federal action under NEPA. *Scenic Rivers Ass'n v. Lynn*, 520 F.2d 240, 243 (10th Cir. 1975). The Supreme Court reversed, again not answering the question of whether the decision not to suspend was federal action, but holding that 30 days was insufficient time to draft, circulate, and properly review an EIS, and that the Secretary was not permitted to suspend the statement of record for any reason other than noncompliance with the disclosure requirements of the Disclosure Act. 426 U.S. at 790. See also *Gulf Oil Corp. v. Simon*, 502 F.2d 1154, 1156-57 (Temp. Emer. Ct. App. 1974); *American Smelting & Ref. Co. v. FPC*, 494 F.2d 925, 947-49 (D.C. Cir.), cert. denied, 419 U.S. 882 (1974); *Dry Color Mfrs. Ass'n, Inc. v. Department of Labor*, 486 F.2d 98, 107-08 (3rd Cir. 1973).

The Supreme Court itself made reference to the Securities Act of 1933 and its 20-day period before registration statements become effective. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788-89 n.9 (1976). The Interstate Commerce Act provides only 30 days for the Commission to exercise its suspension power, and only seven months thereafter (or ten months if the ICC makes a report to Congress under new § 15(8)(a) for suspension, scarcely enough time to prepare an EIS, let alone circulate and revise it in light of public and other agency comments. See *id.* at 789 n.10; *Natural Resources Defense Council, Inc. v. Tennessee Valley Auth.*, 367 F. Supp. 122, 125 (E.D. Tenn. 1973), *aff'd*, 502 F.2d 852 (6th Cir. 1974). Under the Communications Act of 1934 carriers file rate changes on 30-day notice, subject to modification upon showing of good cause and subject to the discretion of the Federal Communications Commission (FCC). 47 U.S.C. § 203(b) (1970). See *American Tel. & Tel. Co. v. FCC*, 503 F.2d 612 (2d Cir. 1974) (FCC extension of notice period from 30 to 60 days upheld; distinguished from Interstate Commerce Act and other enactments where Congress explicitly gives regulatory agency power only to decrease and not enlarge filing period, *id.* at 616-17 & n.7.). The Natural Gas Act provides, as does the Interstate Commerce Act, for 30-day notice for changes in published tariffs; the suspension period is only for five months, after which the tariff changes go into effect whether or not the investigation commenced with the suspension has been completed. 15 U.S.C. § 717c(d)-(e) (1976). See *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 643-45 (1972). Air carriers may alter tariffs upon 30-day notice to the Civil Aeronautics Board (CAB), which may suspend for up to 180 days in connection with an investigation into the lawfulness of the change. 49 U.S.C. §§ 1373(c), 1482(g) (1970 & Supp. V 1975). See *Moss v. CAB*, 430 F.2d 891, 893-94 (D.C. Cir. 1970).

The D.C. Circuit has felt unconstrained by *Flint Ridge* and the "carrier-made rate" language of the Supreme Court in *SCRAP I*. In *Asphalt Roofing Mfrs. Ass'n v. ICC*, 10 E.R.C. 1916 (1977), the court considered, *inter alia*, the lawfulness under NEPA of two orders of the ICC which "permitted rates filed by railroads to go into effect without either investigation or suspension." *Id.* at 1920. Although the court held the decision whether to suspend unreviewable, *id.*, it further determined that "despite the time limitations on these proceedings, the Commission has neglected its statutorily-imposed duty to comply with section 102 of NEPA 'to the fullest extent possible.'" *Id.* at 1923. The relief granted was an order of remand to the Commission so that it could determine environmental impact of the rate increases.

The Court in *Asphalt Roofing* made no mention of *Flint Ridge*, nor did it attempt to reconcile the inaction of the ICC in not suspending the rates with the language of § 102 of NEPA, although the court was hardly unaware of the issue. Brief of Aberdeen and Rockfish R.R., No. 75-2022, at 13-17. It is also unclear as to what is the purpose of the environmental determination ordered to be undertaken. It is no longer within the ICC's power to suspend the rates; even had the ICC suspended the rates, the maximum period of suspension has long since passed. With regard to one set of the rates, the Commission had initiated on its own motion an investigation into the lawfulness thereof as current rates under § 15(1) of the Interstate Commerce Act. *Id.* at 6 n.11. See *Central of Georgia R.R. v. United States*, 379 F. Supp. 976 (D.D.C. 1974), *aff'd sub nom. United States Clay Producers Traffic Ass'n v. Central of Georgia R.R.*, 421 U.S. 957 (1975). Such investigation was not under judicial review, and was not mentioned by the Court of Appeals. To the extent that that investigation results in the prescription of



*Atomic Energy Comm'n, (SIPI).*<sup>42</sup> The court in *SIPI* held that an EIS had to be prepared by the AEC for its liquid metal fast breeder reactor program (LMFBR), since it was a "major federal research program[] . . . aimed at development of new technologies which, when applied, will significantly affect the quality of the human environment."<sup>43</sup> The federal government was an active participant in the march toward LMFBR ubiquity: the AEC was at the time of suit planning the construction of the first LMFBR demonstration plant, and was apparently in charge of administering annual LMFBR program funds of \$130 million. But to place the LMFBR program within the reach of NEPA, the D.C. Circuit defined federal action with the broadest of strokes: a federal action exists not only when the federal government builds a facility, "but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment."<sup>44</sup>

The Ninth Circuit, taking a view contrary to that of the D.C. federal courts, held in two cases decided by differently composed panels, that federal inaction was not action under NEPA. In *San Francisco Tomorrow v. Romney*,<sup>45</sup> plaintiffs claimed that the Secretary of Housing and Urban Development (HUD) erred in failing to file an EIS for each of two redevelopment projects, one in San Francisco and the other in Berkeley. The Yerba Buena Project in San Francisco was funded through a \$50 million federal loan, initial grants of \$31 million, and amendatory agreement grants in 1970 and 1972 totalling \$7 million. The loan and initial grants were provided in 1966 on execution by HUD and the San Francisco Redevelopment Agency of the loan and grant contract.<sup>46</sup> The project was financed under the Housing Act of 1949, the applicable provisions of which "enable basically a contrac-

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rates, federal action will be involved and § 102 of NEPA will be applicable so long as the other requirements of the section are met. See text accompanying notes 64-76 *infra*. But it is impossible to divine the secret purpose behind the ordered relief of the Court of Appeals: there is nothing to which the environmental determination, which will include an EIS if a negative declaration is not appropriate, see, e.g., *Hanly v. Kleindeinst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973), can attach. An EIS produced under the Court of Appeals' mandate will do no more than float serenely in the air: it will inform the ICC with respect to a regulatory decision that is totally beyond its power to make. The whole purpose of section 102 is to inform or otherwise guide the discretion of the agency decisionmaker. See text accompanying notes 90-92 *infra*. Perhaps the court could have ordered the ICC to initiate investigations into the rates as current rates and prepare an EIS with respect thereto. It did not do so and wandered off into the other reality where environmental determinations under section 102 and federal decisionmaking never meet.

A disclaimer is now appropriate: the author of this Article served as counsel (very junior) to certain of the nation's railroads in *Asphalt Roofing*. I left for the groves of academe prior to oral argument and over a year before decision in the court of appeals. It was in working on this case that I first became interested in the inaction as action issue. Of course, this Article represents the opinions only of the author and any expression of views herein should not be attributed to any party or counsel in any litigation.

<sup>42</sup>481 F.2d 1079 (D.C. Cir. 1973).

<sup>43</sup>*Id.* at 1091.

<sup>44</sup>*Id.* at 1088.

<sup>45</sup>472 F.2d at 1021 (9th Cir. 1973).

<sup>46</sup>*Id.* at 1023.

tual relationship between a locality and HUD" under which the latter "can commence any action to enforce any right acquired by [the Secretary] under the contract."<sup>47</sup> Since the loan and grant contract was executed prior to the effective date of NEPA, the court held that further major federal action (post January 1, 1970) was necessary to trigger the section 102 requirements. Emphasizing that "major federal action had terminated" in 1966 when the contract was executed, the court rejected the claim that HUD's "contractual right to monitor the project as it develops to assure compliance with statutory and contractual requirements" constituted further major federal action.<sup>48</sup>

The Ninth Circuit reaffirmed its position with regard to federal inaction through its NEPA ruling in *Molokai Homesteaders Coop. Ass'n v. Morton*.<sup>49</sup> After Hawaii achieved statehood, it applied for and received a loan of \$4.4 million from the Department of the Interior under the Small Reclamation Projects Act of 1956. The loan was used to finance roughly half the cost of the Molokai Irrigation System (the System). The repayment contract between the appropriate state agency and the Department was entered into in 1963 and construction was completed in 1969. Unfortunately, the System was built to carry ten times the amount of water necessary to irrigate the land it ultimately served. Not wishing to waste the extra capacity, the state agency administering the System agreed to rent space therein to a corporation developing a resort complex to house an estimated 30,000 persons by 1984.<sup>50</sup> Apart from a variety of substantive challenges to the authority of the state agency under federal and state law to rent out the space to the development corporation (all of which the court rejected), the plaintiffs argued that under NEPA an EIS had to be prepared before space could be rented. Since the repayment contract was still in force, the court hypothesized the argument (that plaintiffs seemed unable to piece together) that the Interior Secretary's "continuing right to interject himself into the affairs of the System" in the event of contract non-compliance "in effect rendered the Secretary's decision not to participate in this particular rental negotiation, major Federal action."<sup>51</sup> However, the court held that the right to object to breaches of loan agreements and the Secretary's "determination not to object, cannot realistically be classified as 'Federal action,' much less 'major' federal action."<sup>52</sup>

The conflict between the D.C. and Ninth Circuits over the issue of federal inaction as action under section 102 of NEPA came to the fore in unique circumstance when the D.C. and Alaska federal district courts reached

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<sup>47</sup>*Id.* at 1023 n.1.

<sup>48</sup>*Id.* at 1023. The amendatory agreements did not constitute major federal action because the additional funding was merely to provide for rising costs associated with the originally contemplated acquisition and relocation efforts associated with the Project. *Id.*

<sup>49</sup>506 F.2d 572 (9th Cir. 1974).

<sup>50</sup>*Id.* at 774-75.

<sup>51</sup>*Id.* at 580.

<sup>52</sup>*Id.*

opposite holdings on the same controversy independently presented to each court for adjudication. That controversy concerned the non-intervention by the Secretary of the Interior in a state-initiated "wolf kill" program. The State of Alaska, through its Department of Fish and Game, planned to kill 80 percent of the wolves living in 144,000 acres of Arctic territory some or all of which was under federal jurisdiction. The purpose of the kill, to be conducted from airplanes by hunters licensed by the state, was to foster the repopulation of the Western Arctic caribou herd which had been decimated by wolf predation. The state had curtailed subsistence hunting of caribou by the Native population as part of its efforts to re-establish the herd. The first legal action commenced was an attempt to stop the wolf kill: various animal welfare organizations and certain individuals brought suit in D.C. federal court against the Secretary of the Interior and various other officials of that Department. The claim was that by not interfering in the wolf kill the Secretary had engaged in major federal action requiring the preparation of an EIS. The court agreed.<sup>55</sup> But in order to hold that the Secretary had engaged in federal action, the court first had to determine that "there must be some authority in defendants to prevent the wolf kill on these federal lands."<sup>54</sup> The court had no trouble concluding this was the case, both under the Alaska Native Claims Settlement Act, for those of the federal lands involved which had been withdrawn under authority thereof for possible inclusion in the national park system or other federal land preserve programs, and under the Federal Land Policy and Management Act of 1976, for all federal lands on which the hunt was to take place. Citing *SIPI* and a case involving the licensing of public lands for private use, *i.e.*, grazing,<sup>55</sup> the court held that "defendants' failure to exercise their authority" to prevent the wolf kill was "[a] decision by a federal agency which permits another party, governmental or private, to take action affecting the environment" and so constituted a major federal action under NEPA requiring the preparation of an EIS.<sup>56</sup> The court granted the requested relief and issued a preliminary injunction directing the Secretary to order the state to cease its wolf kill program; the Secretary obeyed the court; the state obeyed the Secretary; and the state (not a party to the suit) then sued the Secretary in Alaska federal district court to obtain an injunction directing the Secretary to withdraw his order to the state.<sup>57</sup>

The court in Alaska agreed with the D.C. district court that the Secretary had jurisdiction to halt the wolf kill over federally administered lands under the Federal Land Policy and Management Act of 1976, although the Alaska court had not always been of such a mind.<sup>58</sup> But the fact that the Secretary

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<sup>55</sup>*Defenders of Wildlife v. Andrus*, 9 E.R.C. 2111 (D.C. Cir. 1977).

<sup>54</sup>*Id.* at 2113.

<sup>55</sup>*See* n.14 *supra*.

<sup>56</sup>9 E.R.C. at 2118-19.

<sup>57</sup>*Alaska v. Andrus*, 429 F. Supp. 958, 960-61 (D. Alas. 1977).

<sup>58</sup>In a previous memorandum, unreported but discussed in *Alaska v. Andrus*, 429 F. Supp. at 961, the court determined that the Secretary did not have authority to stop the wolf kill under

could act, was not of itself action which transformed the non-federal wolf kill into a "federal action" under NEPA requiring the preparation of an EIS before it could go forward. The court concluded that the "mere acquiescence" of the Secretary was not "affirmative action on the part of the federal government" which permitted private parties to take action; it was only the latter which qualified as federal action under NEPA<sup>59</sup> and in language which is suggestive of one of the most powerful reasons against the view of the D.C. Circuit and district courts,<sup>60</sup> the Alaska court stated: "Indeed, if an EIS were ever proper it would seem more appropriate when the Secretary chose to close hunting."<sup>61</sup>

### *Agency Inaction As Distinguished From Agency Action*

Thus the lines are drawn: inaction is action on one coast but not on the other. But even if we accept the Ninth Circuit's position that inaction is not action, problems may arise in drawing the line between the two. These problems may reflect on the wisdom of adhering to the inaction is not action approach. Although courts in certain circumstances may have to struggle to distinguish those situations when the government is not acting from those when it is, the definitional process is—even at what may be its most conceptually difficult—closely related to what courts already do in overseeing administrative agencies. But it is not at all certain where the line ought to be drawn in all categories of situations between federal action and inaction. Such a line is necessary to make effective the position of the Ninth Circuit.

In certain situations the line between action and inaction may be clearer than in others. For example, when the government determines not to criminally prosecute a person in the face of allegedly illegal conduct the

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the 1976 Act, also known as the BLM (Bureau of Land Management) Organic Act, 43 U.S.C.A. §§ 1701-1782 (Supp. 1977). The Alaska court read the legislative history to give restrictive content to the right of the Secretary to take into account wildlife preservation goals in the "administration" of public lands by means of control of hunting and fishing, which activities are presumptively, under the Organic Act, matters of state concern. 429 F. Supp. at 962. The reading of the legislative history is not plain; although obviously coming to the same ultimate conclusion on the jurisdictional issue as the Alaska district court, the D.C. district court struggled at length with conflicting legislative interpretations of the BLM Organic Act. The wisdom of deciding such complex and difficult questions of jurisdiction in the abstract, as was done in Alaska and D.C. (although the Alaska court could have pretermitted the issue of the Secretary's jurisdiction), is challenged at text accompanying notes 105-37 *infra*.

59. 429 F. Supp. at 963.

60. See text accompanying notes 82-84 *infra*.

61. 429 F. Supp. at 963. The Alaska court ordered summary judgment in favor of the State of Alaska, but did not grant an injunction against the Secretary, which injunction would have placed the Secretary in the unenviable position of being in contempt of one of the courts, D.C. or Alaska, at all times. The Alaska court did express the view, however, that its judgment would have binding effect on the parties in the D.C. action. *Id.* at 964. The D.C. District Court has recently expressed its disagreement by denying a motion to dismiss on the grounds of failure to join dispensable parties and res judicata/collateral estoppel. *Defenders of Wildlife v. Andrus*, 11 E.R.C. 1235 (D.D.C. 1978).

government is clearly not acting. Conversely, government prosecution may be such affirmative activity as would require an EIS. The issuance of a license or permit by a government agency is affirmative federal action.<sup>62</sup> Similarly, final agency action to require, for example, cessation of nongovernmental activity would qualify as "federal action" under section 102 of NEPA,<sup>63</sup> while the mere non-use of enforcement authority by a regulatory agency would not so qualify. The "wolf kill" cases come as close to such a pure example as is reported.

The most problematic area in which to draw the line between federal action and inaction comes in the pre-filing, non-suspension scheme common to much federal regulation. The Interstate Commerce Act contains one such scheme, as has been discussed in some detail above.<sup>64</sup> The Natural Gas Act and the Federal Communications Act also provide for the filing of tariff changes with the appropriate regulatory agency,<sup>65</sup> which tariff changes become effective unless suspended before the notice period ends. The agency may suspend and investigate such tariff changes, or may wait until such changes become effective and conduct an investigation into the tariffs as current rates and conditions.<sup>66</sup> Just as the ICC may determine just and reasonable rates after an investigation initiated under § 15(1) or new § 15(8) of the Interstate Commerce Act, so may the Federal Power Commission and the Federal Communications Commission take such action after investigations of new or current rates and conditions under the Natural Gas Act and Federal Communications Act, respectively.

The question is when are tariff changes<sup>67</sup> the result of private action and when can they properly be considered the product of federal agency action? The carrier (or other regulated entity) initiates the tariff change and the mere non-suspension of the change does not thereby transform it into an agency-made rate or condition.<sup>68</sup> At the other extreme, where an agency determines that a new or existing tariff is unjust, unreasonable, or otherwise

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<sup>62</sup>See note 19, *supra*.

<sup>63</sup>Note, *The Environmental Impact Statement Requirement in Agency Enforcement Adjudication*, 91 HARV. L. REV. 815 (1978). But see *Gifford-Hill & Co. v. FTC*, 389 F. Supp. 167 (D.D.C. 1974), *aff'd*, 523 F.2d 730 (D.C. Cir. 1975), where the court of appeals carefully, in view of its position with respect to federal inaction as action, limited its holding that NEPA was not applicable to decisions "to institute adjudicatory proceedings, and a fortiori its decisions to institute investigations to determine whether adjudication is warranted. . . ." 523 F.2d at 733 n.7 (emphasis added). See also *Mobil Oil Corp. v. FTC*, 430 F. Supp. 855 (S.D.N.Y.), *rev'd*, 562 F.2d 170 (2d Cir. 1977).

<sup>64</sup>See notes 35-36 *supra* & text accompanying.

<sup>65</sup>15 U.S.C. § 717c(d)-(e) (1976); 47 U.S.C. §§ 203, 204 (1970).

<sup>66</sup>The Federal Power Commission may conduct an investigation into effective tariffs under the authority of § 5(a) of the Natural Gas Act, 15 U.S.C. § 717d(a) (1976). The Federal Communications Commission may conduct such an investigation under § 205(a) of the Federal Communications Act of 1934, 47 U.S.C. § 205(a) (1970).

<sup>67</sup>The most likely to be objected to are rate increases, whether accomplished by simply raising a published rate, or by some indirection, such as by eliminating preferences in a rate structure. See, e.g., *Central of Georgia R.R. v. United States*, 410 F. Supp. 354 (D.C. Cir. 1976).

<sup>68</sup>*United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* 412 U.S. 669, 693 n.17 (1973).

unlawful and establishes a rate or condition which is just and reasonable, the agency has taken over the tariff-making process and the result is clearly due to federal action, qualifying for full environmental consideration under section 102 of NEPA. The courts have long been faced with the responsibility of determining whether rates and conditions have thus been "prescribed" by the agencies, a task made necessary by the procedural incidents to a prescription proceeding: if the agency has acted to prescribe rates without following the requirements for a hearing and without making a finding that current rates are unjust and unreasonable, the rates have unlawfully been established.<sup>69</sup> There are other reasons why it may be important to know whether rates have been prescribed by the agency.<sup>70</sup>

By using "prescription" as the test for distinguishing agency inaction from action under NEPA, the "careful accommodation of the various interests involved"<sup>71</sup> that Congress has established in its regulatory schemes would be preserved. Congress is well aware of the difference between a license or permit on the one hand and a regulatory scheme embracing private tariff-making initiative on the other.<sup>72</sup> When Congress, therefore, leaves the tariff-making initiative with private parties, so long as the agency does not use its powers to prescribe the tariffs, the action engaged in is only private.<sup>73</sup> Having accepted that inaction is not action under NEPA, the line that ought thus to be drawn with respect to the cognate regulatory schemes above discussed<sup>74</sup> is the one which has traditionally distinguished carrier-made rates and conditions from agency-prescribed rates.

It should be noted that in the application of the "prescription test," courts have held rates or conditions prescribed when the agency has not explicitly so prescribed the rates, only in the most unusual of circumstances, and has normally given agency-industry communication and the regulatory interplay thereby involved the widest of berths.<sup>75</sup> The respect given thereby to

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<sup>69</sup>See, e.g., *American Tel. & Tel. Co. v. FCC*, 487 F.2d 865 (2d Cir. 1973); *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970).

<sup>70</sup>See, e.g., *Arizona Grocery v. Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932).

<sup>71</sup>*United States v. SCRAP*, 412 U.S. 669, 697 (1973); *American Tel. & Tel. Co.* 487 F.2d 865, 881 (2d Cir. 1973).

<sup>72</sup>Under the Federal Food Drug and Cosmetic Act of 1938 a new drug application (NDA) became effective automatically if not disapproved by the Secretary of Health, Education and Welfare within 180 days of filing. In 1962 the Act was amended to provide that an NDA became effective only upon approval by the Secretary and such approval shall be granted within 180 days after filing or notice shall be given to the applicant of an opportunity for a hearing on whether the NDA is approvable. 21 U.S.C. § 355(a)-(d) (1970); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 612-13 (1973).

<sup>73</sup>Section 4(d) provides not for the filing of 'proposals' but for notice to the Commission of any 'change . . . made by' a natural gas company, and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action." *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 342 (1956).

<sup>74</sup>The list is, of course, not exclusive. The CAB, for example, enforces a similar regulatory scheme, see *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970).

<sup>75</sup>*In Port of New York Auth. v. United States*, 451 F.2d 783 (2d Cir. 1971), the court treated as a suspension decision, and therefore unreviewable, an order of the ICC which refused

the private contribution to tariff-making should properly inform, and restrict, courts when they turn to NEPA and decide whether a rate or condition is the result of private or federal action.<sup>76</sup>

Finally, the fact that courts have supplied through prescription a ready and carefully tuned mechanism for distinguishing between federal inaction

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to vacate a suspension order previously entered with respect to increased rates for lighterage service but which authorized the rail carrier to publish tariffs with rate increases at fifty percent of the level originally sought. *See also* Consolidated Edison Co. v. FPC, 512 F.2d 1332 (D.C. Cir. 1975), where it was held that an order of the FPC was not prescriptive which set forth in fairly detailed terms what sorts of natural gas curtailment plans the Commission thought appropriate for filing under § 4 of the Natural Gas Act, *id.* at 1336-37, along with a warning that curtailment plans not conforming to its order "would be suspended and investigated and subject to final disapproval as 'preferential or discriminatory . . .'", *id.* at 1340. The court took care to state: "Regulation through 'raised eyebrow' techniques seems inherent in the structure of most administrative agencies, combining as they do both policy-making and adjudicative functions. Short of sweeping condemnation of 'the system,' judicial attempts to control it must be sensitive to the particular regulatory context in which it occurs, the interests affected by it, and the potential for abuse." *Id.* at 1341 (footnote omitted). Even when the agency initiates an investigation into the lawfulness of new or current rates or conditions, the termination of the investigation may be arranged so as not to involve prescription. *ICC v. Inland Waterways Corp.*, 319 U.S. 671, 686-87 (1943).

Cases holding that rates had been prescribed by agency action and were not simply carrier-made although purportedly made through the filing and notification procedures without agency suspension, include: *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975) and *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970). *See also* *American Tel. & Tel. v. FCC*, 487 F.2d 864 (2d Cir. 1973) (FCC institution of a special permission requirement for filing of rate increases held unlawful as a rate prescription made without proper hearing and findings).

<sup>76</sup>The Supreme Court's decision in *SCRAP II* may be inconsistent with the view expressed above that only in prescribing rates and conditions is an agency acting. And, in the broadest reading of its implied dictum, *SCRAP II* may be read to give support to the advocates of the inaction as action doctrine. But the comfort derived therefrom by these persons ought to be slight. First, it is not clear that the Supreme Court had in mind the problem of inaction as action when it deemed "clearly correct" the conclusion by the parties that the decision not to declare unlawful the rate increase subject to a general revenue proceeding constituted a "major federal action" for purposes of NEPA. *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 318-19 (1975). In fact, the Court later appeared far less sure of the proposition that an EIS would be required for such a decision, *id.* at 323 n.21, where it stated: "The ICC has concluded, and we agree, that the standards of the Act are broad enough to permit consideration of environmental factors, even at general revenue proceedings." Furthermore, the Court never directly addressed the question whether the determination not to declare unlawful a general rate increase following a general revenue proceeding is a "prescription." The Court initially describes an ICC action in an earlier general revenue proceeding as not "prescribing any of the new rates," *id.* at 312, noting, *id.* at 312 n. 14, that a prescription of rates would cut off refund claims by injured shippers under *Arizona Grocery Co. v. Atchison T. & S.F. Ry.*, 284 U.S. 370 (1932). The Court then, 422 U.S. at 312-13, quotes language from the case in which the Court had approved the use by the Commission of that earlier general revenue proceeding which language is highly suggestive that the ICC's determination not to declare a general rate increase unlawful is a rate prescription, *United States v. Louisiana*, 290 U.S. 70, 77 (1933), even though the Commission's order would not be a prescription "'within the meaning of the decision in *Arizona Grocery*.'" *Ex Parte No. 281, Increased Freight Rates and Charges*, 1972 (Environmental Matters), 346 I.C.C. 88, 103 (1973), as quoted in *SCRAP II*, 422 U.S. at 313. Reflecting the uncertainty of the Supreme Court, perhaps the one thing that is clear is that an order by the ICC that rate increases are not unlawful following a general revenue investigation precariously straddles the line between agency action and carrier action (the latter being, also, agency inaction). If such an order is agency action the ICC is bound by section 102 of NEPA; if

and action in that arena where the constant interaction between regulator and regulated makes division of responsibility most difficult, is also some indication that Congress knows the difference between agency action and agency inaction when it enacted NEPA, and thus meant the EIS to attach only to the former. What little legislative history seems relevant to the inaction as action issue seems to point to the same conclusion. In the Report on NEPA by the Senate Committee on Interior and Insular Affairs, the "growing concern" by the public was identified in its "indignation and protest over the actions or, in some cases, the lack of action of Federal agencies." Congress, in short, knew how to say "inaction" when that is what it meant.

DEAD WOLVES OR DEAD CARIBOU:  
WHO SHOULD DECIDE AND HOW?

To treat inaction as action under section 102 of NEPA is to invite a most destructive form of arbitrariness into judicial decisionmaking. This alone is reason enough not to follow the path the D.C. Circuit has hacked through the plain meaning of NEPA.

The position of the D.C. federal courts is, again, that for the government not to act when it has the power to do so is action for purposes of section 102 of NEPA. If such action is "major" and the environment is "significantly affected," an EIS must be prepared before the action can proceed. As in *SCRAP I* and *Defenders of Wildlife* a district court which adheres to the inaction as action position may find it appropriate to grant preliminary injunctive relief to require the federal action, to wit, the federal inaction, to cease: the court could either require the agency to move against the non-federal actors and so halt the environmentally-offending activity, or directly order the non-federal parties to halt any further steps to accomplish their forbidden goals. The forced cessation of activity by the non-federal parties thus accomplished is quite consistent with accepted NEPA practice when a court determines that an EIS must be prepared: the private party and the federal

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the order is agency inaction NEPA should not apply. In *SCRAP II* the Supreme Court not only did not focus on the problem, but had before it an EIS that was perfectly adequate had one been required.

The views expressed in the text above are not inconsistent with *State of Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974). That case held, with respect to NEPA, that the FPC could not order adoption of a permanent natural gas curtailment plan of the FPC's own devising without preparation of an EIS.

"115 CONG. REC. 19010. In debate on NEPA, its principal sponsor, Senator Henry Jackson, speaks of § 102 as applying to "any Federal agency which takes action." *Id.* at 40416. Just prior to making this statement, in relation to the statement of environmental policy of § 101 of NEPA, Senator Jackson stated our intention "as a government or as a people" not "to initiate actions which endanger the continued existence or health of mankind" or "which will do irreparable damage to the air, land, and water which support life on earth." *Id.* If Senator Jackson can distinguish between actions taken or initiated by the government and actions taken or initiated by the people, so ought the courts.



agency are "partners" in the activity at issue (partners by virtue of government inaction), and "it is 'beyond challenge' that one in partnership with the federal government can be prohibited from acting in a certain manner."<sup>78</sup>

Injunctive relief is issued in consonance with the principle that until an adequate EIS is prepared the major federal activity should not go forward, so that, as is the command of section 102,<sup>79</sup> the "agency decision-maker has before him and takes into proper account<sup>[80]</sup> all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance."<sup>81</sup> It should be stressed that section 102 of NEPA is violated not by failing to reach the environmentally correct decision, but failing to prepare an EIS.

So the housing project is not built, the historic building is not leveled, the wolf kill is not commenced, and the rates are not hiked until after the agency properly considers the environmental impact, which it cannot do without preparing an EIS or giving a sufficient "negative declaration."<sup>82</sup> But, while the agency is directed to withdraw funding or deny a license or other permission in the two former cases, in the two latter situations the Secretary and agency are ordered to exercise purported authority: the court directs them to act. Yet it is the very "action" that the court has compelled<sup>83</sup> which by the explicit terms of the statute is not to go forward unless and until an EIS has been prepared and has guided the discretion of the agency decisionmaker. Calling inaction action does not thereby somehow unmake the federal action that is the necessary result of the granting of interim relief. As the Alaska District Court emphasized, the halting of the wolf kill would be a federal action to which NEPA would apply, if it would apply at all.<sup>84</sup> There are now two mutually exclusive federal actions (federal inaction and federal action

<sup>78</sup>*Silva v. Romney*, 473 F.2d 287, 289-90 (1st Cir. 1973); *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323, 1330 (S.D.N.Y. 1975).

<sup>79</sup>"[T]he Section 102 duties are not inherently flexible." *Calvert Cliffs' Coord. Comm. Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

<sup>80</sup>"The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (citation omitted).

<sup>81</sup>*Calvert Cliffs' Coord. Comm. Inc. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

<sup>82</sup>*See Hanly v. Kleindeinst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

<sup>83</sup>For purposes of NEPA it makes no real difference whether the injunction is directed by its language against the agency or against the private party alone. The court that frames its injunction so that it speaks only to the non-federal parties is no less engaged in the forced extension of federal agency power than if the Secretary or other official or body is directly involved by the court in the process of compelling the cessation of the private activity. The result is the same, and the basis of the court's power to order cessation of the activity to cease is ultimately derivative of the supposed authority of the federal agency to act. *Cf. SCRAP I*, 412 U.S. 669, 692 (1973) (rule against enjoining railroad rates before final determination by ICC of lawfulness violated by injunction running against Commission as well as by one running directly against railroads).

<sup>84</sup>*See* note 61 *supra* and text accompanying.

necessary to end federal inaction) both of which ought not go forward until an adequate EIS is prepared. In the case of the Alaskan wolf kill the failure to halt as well as any step to halt the private activity would be the mutually exclusive federal actions.

One approach to this problem would be to make an exception in the case of federal inaction to the authority of the courts to grant injunctive relief, preliminary or final, in section 102 cases. In the wolf kill example, then, the court would order preparation of an EIS, but refuse to order a halt to the Alaskan program. This is unsatisfactory for a number of independently valid reasons. The proponents of the theory that federal inaction is federal action under NEPA cannot have it both ways; the strength of their argument comes from the lack of difference between the two: federal inaction is federal action because federal inaction is no less destructive of the environment and involves the active and purposeful noninterference of the federal agency under whose jurisdiction the activity falls. To then argue that inaction is sufficiently different from action so that inaction need not be enjoined under those circumstances that would lead a court to enjoin continued federal action, cuts deeply into the underlying justification for treating the two alike in any way.

Furthermore it may well not be wise for the courts to deprive themselves of the injunction weapon in a whole class of EIS cases, *i.e.*, where the action complained of is agency inaction. If inaction is action under NEPA, the courts ought to be able to prevent the case from mooting itself through completion of the private activity with respect to which the federal agency is not doing anything. Preparation of an EIS takes time;<sup>85</sup> completion may follow rather than precede consummation (if not substantial progress thereto) of the activity the nonprevention of which is the subject of the EIS. This would make a mockery of section 102; the EIS would not do what it is supposed to do: "enable decisionmakers to consider a project such as this one with full awareness of the environmental consequences."<sup>86</sup> With all the power at its command, the federal government has yet to demonstrate how it may raise wolves from the dead. The federal courts should avoid looking too ridiculous;<sup>87</sup> to label federal inaction as action, to require the preparation of an EIS, and then to stand idly by while the agency decision to which the EIS is supposed to attach evaporates, is to be too ridiculous.

For the above reasons courts should not disclaim their injunctive power in cases of federal inaction as action under NEPA.<sup>88</sup> And, indeed, the district

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<sup>85</sup>See note 41 *supra*.

<sup>86</sup>*Environmental Defense Fund v. Stamm*, 430 F. Supp. 664, 665 (N.D. Cal. 1977). The other purposes of the EIS were stated by the court to be "provid[ing] the public with information and encourag[ing] public participation in developing that information." *Id.*

<sup>87</sup>See, e.g., *Evans v. Abney*, 396 U.S. 435 (1970); *Evans v. Newton*, 382 U.S. 296 (1966).

<sup>88</sup>Nor would environmental plaintiffs want the courts to. An attraction of the inaction as action position for such persons is that it allows them to use the courts to compel agencies to take "pro-environmental" action under § 102 of NEPA when such relief would not be available from the courts if the agency inaction were reviewed on the merits. See notes 150-51 *supra* & text accompanying.

courts in *SCRAP I* and in *Defenders of Wildlife* did grant injunctive relief against the appropriate federal agency, compelling same to move against the non-federal party engaged in the offending activity.<sup>89</sup> We thus return to the problem of two actions neither of which may proceed without an EIS and one of which must. But which one, and how is a court when faced with this dilemma to choose?

NEPA itself does not contemplate any such choice; it merely requires that an EIS must accompany any proposal for a major federal action which significantly affects the environment. A court which adopts the inaction as action position and chooses between two opposing actions has defined itself out of the statute, and is operating in that never-never land where children never grow old and judges search only for basic truths, unhampered by legislative guidance or constraint. In short, the court is acting in a purely arbitrary fashion when choosing which action shall be the action to which section 102 is to apply this time.

Suppose, though, that the court makes a determination as to which course, federal inaction or federal action, is more environmentally harmful. Courts, however, eschew just that sort of determination when reviewing agency decisions based upon an EIS. The agency is merely supposed to give the environmental consequences of its proposed action a "hard look."<sup>90</sup> There is no requirement in NEPA that the action shall go forward only if it is less destructive to the environment than any alternative although some have argued for such a result.<sup>91</sup> The environment is but one factor in a decision whether to act and section 102 of NEPA is designed only to make sure that the environment remains a factor. NEPA does not dictate the outcome of the decisionmaking process which is essentially political and properly one remaining with the federal agencies rather than with the courts.<sup>92</sup> Courts are simply not equipped to decide how many jobs are worth how much clean air.<sup>93</sup> Con-

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<sup>89</sup>Even if the courts were to disclaim injunctive power in inaction cases, the tension between the two "actions" would not disappear. NEPA is quite clear that the federal action shall not begin before an EIS is prepared. The courts cannot avoid the force of this command, and the impossibility of following it under the inaction as action doctrine, by simply giving up the authority to enforce the EIS requirement in NEPA inaction cases. Thus, the "solution" rejected in the text immediately above is no solution at all.

<sup>90</sup>One of the more interestingly constructed statements of the limited role of the courts in judging the adequacy of the EIS comes from the Tenth Circuit: "Nor should the courts in evaluating an EIS engage in hindsight judgment by way of second guessing." *Save Our Invaluable Land (Soil), Inc. v. Needham*, 542 F.2d 539, 543 (10th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).

<sup>91</sup>See Cohen and Warren, *Judicial Recognition of Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. IND. US AND COM. L. REV. 685 (1972). The Eighth Circuit has held that NEPA Review may be had of an agency decision on the environmental merits. *Environmental Defense Fund v. Corps of Eng'rs*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

<sup>92</sup>Agencies, though, can sometimes be too responsive to political pressures. See, e.g., *D.C. Fed'n of Civic Ass'ns. v. Volpe*, 459 F.2d 1231, 1245-49 (D.C. Cir. 1972).

<sup>93</sup>This Article is being written by window light in Indiana in 1978 during the third month of the coal strike. The Governor is seeking authority to remove anti-pollution devices from coal-

gress and the Executive will determine how much environmental degradation is enough and the courts will enforce their determinations; NEPA furthers that principle, removing no iota of ultimate decisionmaking authority from the federal agencies who decide when and whether to act, and at what cost.

Even if a court could look solely to protection and enhancement of the environment to decide which action—action or inaction—should be enjoined pending an EIS, it would do so without the benefit of the EIS it would demand of the agency before the agency weighed the environmental factor in its decision. Furthermore, the court's conclusion as to environmental impact without the EIS is determinative of its resolution of the conflict between the two actions, while the agency, with the EIS before it which has been prepared with the full panoply of procedural safeguards that NEPA provides, only employs the environment as one factor in its decision. If an agency were to make an assessment of the environmental impact without preparing an EIS for a proposed federal action which significantly affects the environment, a court would properly and with great indignation find the agency in violation of NEPA'S mandate. The court no less violates NEPA'S mandate when the court decides without an EIS which of two alternatives presented to it is the least harmful to the environment.<sup>94</sup> The court thus employs a double standard when making its environmental assessment of agency action(s) in deciding an inaction as action case on the merits.

Furthermore, it is not entirely clear what course—action or inaction—is environmentally “better.” For example, in *SCRAP I*, Mr. Justice Douglas stated his belief that lower rates for recyclable materials would be “perhaps the most immediate and dramatic illustration of a policy which will encourage protection of the environment against several erosive conditions,”<sup>95</sup> including waste incineration with accompanying air pollution, litter on the landscape, and lumbering and mining.<sup>96</sup> Free carriage of recyclables would be even more environmentally supportive; the result, though, would be free carriage on no railroads. As Mr. Justice White quite pointedly stated: “I add

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burning power plants. The appeal by the citizenry for relief from this crisis is being made to the political authorities and they are responding. Lord help the court that stood in the way of light and heat; there is some confidence that the ever present next election will energize the Governor, our U.S. Senators and Representatives, and other officials, particularly in the executive branch of the federal government, to take appropriate action to save life and health.

<sup>94</sup>Throughout this discussion the assumption has been made that there is but one action which is the alternative to inaction. That is, of course, not the case. Not only would there be a range of regulatory enforcement steps that an agency could take, and a court could therefore compel, short of complete prohibition, but also there might be a variety of ultimate actions which could be taken by the agency, of a different regulatory “flavor” than prohibition. For the sake of simplicity only the prohibition alternative to agency inaction will be postulated. The lack of flexibility, probably inherent, in the court to devise novel regulatory actions to compel in the face of agency inaction is but further evidence of the sterility and hopelessness of the inaction as action position.

<sup>95</sup>*United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 700-01 (1973) (Douglas, J., dissenting in part) (footnote omitted).

<sup>96</sup>*Id.* at 700.

only that failure to maintain this country's railroads even in their present anemic condition will guarantee that recyclable materials will stay where they are—far beyond the reach of recycling plants that as a consequence may not be built at all.”<sup>97</sup>

From what source is a court to draw for the wisdom to decide who shall live and who shall die: shall the gods decry dead wolves and living caribou today or have caribou outlived their immediate usefulness, at least in such exorbitant numbers, in this most perfect of ecosystems? As the spirit that day moved it, the district court in *Defenders of Wildlife*<sup>98</sup> decided to let the caribou be killed. The court based its decision to force the halting of the wolf kill on its special view of the environmental needs of the Arctic wilderness, which could only have been farther away from the court if it had moved to Key West to render its judgment. The court noted that the wolf and caribou “have coexisted for at least 10,000 years” in this region.<sup>99</sup> After stating that the wolf as predator serves a useful function in “keeping the caribou’s habitat and food supply from being overburdened,”<sup>100</sup> the court made the following pronouncement:

The elimination of a substantial portion of the predator population may cause the caribou population to oscillate widely and, in the long term, decline significantly. When weak members of the herd are not eliminated, the health of the entire population may be adversely affected and the habitat and food supply may be overburdened. This, in turn, may cause a marked decline in the caribou population. This has occurred as a result of other predator control programs.<sup>101</sup>

The court also stated that the wolf kill might destroy the pack structure of the wolves,<sup>102</sup> and predicted that “the interests of the native subsistence hunters who partially depend on the caribou may be impaired.”<sup>103</sup> The appropriately deferential use of “may” notwithstanding, it is clear that the D.C. court did in fact, as it must have, base its decision on its own view of what was best for the Arctic ecosystem. The State of Alaska obviously thought otherwise, as may have the Alaska native who hunted caribou that were no longer around. Whether the Alaska district court agreed with the state’s position is a question that that court need not, given its view that inaction is not action under NEPA, and did not answer; it merely presented the views of the state, avoiding gratuitous comment on the validity of same.<sup>104</sup>

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<sup>97</sup>*Id.* at 724 (White, J., dissenting in part). For a similar view see the marvelous *Chad Gadyah* in *Port of New York Auth. v. United States*, 451 F.2d 783 (2d Cir. 1971) at 790.

<sup>98</sup>See note 53 *supra*.

<sup>99</sup>*Defenders of Wildlife v. Andrus* 9 E.R.C. 2111, 2112 (D. D.C. 1977).

<sup>100</sup>*Id.*

<sup>101</sup>*Id.*

<sup>102</sup>*Id.* at 2113.

<sup>103</sup>*Id.* at 2118.

<sup>104</sup>See *Alaska v. Andrus*, 9 E.R.C. 2148, 2149 (D. Alas. 1977).

Inaction as action is a trap: any court taking that position assumes unto itself a power that is not given and that ought not therefore be exercised. Its exercise is an affront to NEPA and to the principle that such naked arbitrariness does not belong in judicial decisionmaking.

#### WITHER JURISDICTION

An environmental impact statement is principally designed to inform or guide the discretion of the agency decisionmaker. The "hard look" given to environmental factors by the agency is always in the context of a decision the agency must make; otherwise, the EIS would have no particular function, being no more than a periodic review of the agency's relationship to the environment. An EIS, then, attaches to the decision of the agency whether to go forward and take the action which it is considering whether to propose. When the action is inaction, the alternative can only be action. The agency must be empowered to take some action with respect to that private activity which, under the inaction as action theory, has been federalized by government inaction in regulating or prohibiting such activity.<sup>105</sup>

The court, therefore, must find that the agency has jurisdiction over the offending private activity. The court ought also itself have jurisdiction to review the agency decision not to act had the suit been brought challenging that decision on the merits, not under section 102 of NEPA. Assume that the decision of the agency not to act is unreviewable.<sup>106</sup> *SCRAP I*, an inaction case, teaches that NEPA does not place in the courts the power to act that was not previously theirs to wield.<sup>107</sup> It would nevertheless be possible for a court to review a decision of an agency for NEPA compliance even if it were to lack the power to review the decision on the merits and order effective relief. In such circumstances all the court could do would be to order the agency to prepare an EIS and keep preparing it until the agency had done so

<sup>105</sup>The requirement that the court find that the agency could have acted derives also from the very nature of the government "action" which has triggered the EIS preparation obligation. To find that the government has acted through "inaction" there must have been an "action" which was not taken.

<sup>106</sup>Examples of the unreviewability of decisions by agencies not to assert their authority include a decision by the U.S. Attorney or Attorney General not to prosecute or proceed under the federal criminal or civil laws, *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868), a decision by the Federal Trade Commission not to file a complaint under § 5 of the Federal Trade Commission Act, *FTC v. Klesner*, 280 U.S. 19 (1929), and a decision by the General Counsel of the National Labor Relations Board not to institute an unfair labor practice complaint. *Vaca v. Sipes*, 386 U.S. 171 (1967). Professor Davis states: "[D]iscretion [not to enforce] is controlled little or none and review is rather rare." K. DAVIS, *ADMINISTRATIVE LAW* 493 (1977).

<sup>107</sup>*Under Arrow Trans. Co. v. Southern Ry.*, 372 U.S. 658 (1963), the federal courts were held to lack the jurisdiction to enjoin the effectiveness of rate increases pending final determination of their lawfulness by the ICC. The Supreme Court in *SCRAP I* held that Congress did not by NEPA evince any intention "to restore to the federal courts the power temporarily to suspend railroad rates, a power that had been clearly taken away by §15(7) of the Interstate Commerce Act. The statutory language, in fact, indicates that NEPA was not intended to repeal by implication any other statute." 412 U.S. at 694.

correctly and within the full spirit of the law. In the case of unreviewable inaction the court could not order the agency to regulate the private activity pending the preparation of the EIS. For reasons given in some detail above<sup>108</sup> this seems, at the very least, to be undesirable.<sup>109</sup>

When the court is faced with an inaction as action claim under NEPA where the agency inaction would have been reviewable by the court had the contention of plaintiffs been other than that the agency violated NEPA's EIS requirements, the court must still decide whether the agency could have acted to regulate the private activity, *i.e.*, could have prevented the wolf kill, was empowered to prohibit the leasing of space within the irrigation system, could have stopped continued development of the urban redevelopment project. There would be three categories of situations with which a court would have to deal: (1) where the regulatory-enforcement jurisdiction of the agency is in doubt and the agency through the exercise of its expertise can be expected to

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<sup>108</sup>The case may become moot, *see* text accompanying notes 85-87 *supra*.

<sup>109</sup>*SCRAP II* speaks broadly against this proposition. The Supreme Court held that even if a decision following a general revenue investigation were unreviewable on the merits and a court could not, therefore, enjoin collection of rates under the rule of *Arrow*, the adequacy of the EIS prepared in connection with the general revenue proceeding could be challenged in federal court. 422 U.S. at 319. The order of the district court on review in *SCRAP II* directed the ICC to reopen the general revenue proceeding and prepare an EIS which meets the requirements of NEPA as set forth by the district court. *Id.* at 307-08. "Were the ICC to refuse to [prepare another impact statement], the court would have no way of enforcing its order other than contempt, and it could not permit its order to be ignored." *Id.* at 308 n.11. The increased rates would continue in effect and could not be suspended and the only power of the court would be to order the agency to prepare an EIS, and keep preparing an EIS until the agency "finally gets it right."

*SCRAP II* can be considered an unusual case because if and when the ICC were ever to declare the rates unlawful, after finally preparing an adequate EIS, reparations would be available from the time of initiation of the rates. *See* *Nader v. FCC*, 502 F.2d 182, 203 n.22 (D.C. Cir. 1975). Repeated EIS's in the wolf kill case without authority of the court to review and remedy on the merits would result in a lot of dead wolves and a useless EIS. Second, the Court in *SCRAP II* did not have to consider the frustration of the judicial process through repeated preparations of inadequate EIS's since the EIS prepared by the ICC was adequate and fully consistent with the mandates of NEPA. Third, the Supreme Court in *SCRAP II* did not hold that a decision that rates were not unlawful following a general revenue investigation is unreviewable, assuming such to be the case. Finally, *SCRAP II* may have dealt with agency action, not inaction, *see* note 76 *supra*, and the courts might well be less willing to extend NEPA EIS review to cases of nonreviewable agency inaction than to cases of nonreviewable agency action, in light of the presumptions in favor of review of the latter, *Abbot Laboratories v. Gardner*, 387 U.S. 136 (1967), and against review of the former, *see* note 133 *infra* & text accompanying.

The Council on Environmental Quality has expressed at least a preliminary view supporting the view that agency inaction is action only when "that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action." CEQ Draft Regulations § 1508.16, 8 ENVIR. REP. (BNA) (Current Developments) 1291, 1308 (1977).

For the proposition that *SCRAP I* did not hold as a general matter that injunctive relief could not be ordered in a NEPA proceeding where such relief could not have been ordered had the court attempted to review the agency action on the merits, *see* *Shiffler v. Schlesinger*, 9 E.R.C. 1839, 1842-43 (3d Cir. 1976). The denial of injunctive relief by the district court was affirmed by the Third Circuit, making its pronouncements on the power of courts to order such relief no more than interesting dictum.

shed helpful light on the issue; (2) where the jurisdiction of the agency to act is in doubt but it is not reasonable to expect that the agency will aid in the search for an answer to the problem; and (3) where the jurisdiction of the agency to act is clear.<sup>110</sup>

The first category encompasses those situations where the jurisdiction of the agency is in doubt and the agency can be expected to be of material assistance in determining the issue. Even though an agency may not have the final say with respect to its jurisdiction—the court being the ultimate arbiter of the breadth of the authority which an agency may assert—the agency's "jurisdiction to determine whether it has jurisdiction is as essential to its effective operation as is a court's like power."<sup>111</sup> Where a threshold, *i.e.*, jurisdictional, determination is to be made and the administrative expertise of the agency is particularly suited to aid in that determination, the proper course would be "for the court to await an appropriate administrative declaration before it acted."<sup>112</sup> The court should defer initially to the agency for jurisdictional matters within the agency's special expertise whether there is an administrative proceeding already under way,<sup>113</sup> or the court would be required to refer the matter to the agency under the doctrine of primary jurisdiction.<sup>114</sup> If, for example, the Food and Drug Administration (FDA) refuses after petition<sup>115</sup> to recommend<sup>116</sup> that the United States proceed to enforce the Federal Food, Drug and Cosmetic Act through injunctive<sup>117</sup> or criminal<sup>118</sup> proceedings against the introduction into interstate commerce of a new drug,<sup>119</sup> the inaction thereby established may be complained of in a NEPA suit as action requiring the preparation of an EIS. To hold that the FDA has not acted, the court would have to find that the substance the introduction of which is the complained-of violation of the law, is a new drug under the statute.<sup>120</sup> Such a conclusion is one that properly should be made, in the first instance, by the FDA, not the courts.<sup>121</sup>

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<sup>110</sup>Where the jurisdiction of the agency to act is clearly not present, the only course for the court to follow would be to hold that there has been no inaction. The last category, then, covers only that situation where the agency clearly has jurisdiction to act.

<sup>111</sup>Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 627 (1973).

<sup>112</sup>Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, 652 (1973).

<sup>113</sup>FPC v. Louisiana Power & Light Co., 406 U.S. 621, 647 (1972).

<sup>114</sup>Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645 (1973); *Far E. Conf. v. United States*, 342 U.S. 570 (1952).

<sup>115</sup>Any interested party or citizen may petition the FDA to take or refrain from taking any administrative action. 21 C.F.R. §§ 10.25, 10.30 (1977).

<sup>116</sup>Before a report is made to a U.S. Attorney recommending criminal prosecution, notice and opportunity for informal hearing are provided by the FDA. 21 C.F.R. §§ 7.84-7.87. (1977).

<sup>117</sup>21 U.S.C. § 332 (1970 & Supp. V 1975).

<sup>118</sup>21 U.S.C. § 333 (1970).

<sup>119</sup>21 U.S.C. § 355 (1970 & Supp. V. 1975). A violation of § 355 is an appropriate occasion for invocation of §§ 332 and/or 333 through the intermediation of 21 U.S.C. § 331 (1970 & Supp. V 1975).

<sup>120</sup>The term "new drug" is defined at 21 U.S.C. § 321(p) (1970).

<sup>121</sup>Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645 (1973).



The FDA, in such a situation, ought to be able to decide the matter with certainty and some dispatch. The serious problems which can arise from deferring to an agency's jurisdictional expertise can be demonstrated with another example. Suppose that the regulatory posture taken by the Federal Communications Commission with respect to cable television (or CATV)<sup>122</sup> is that which existed in the 1950's; that is, suppose that the FCC were not regulating cable television and had no plans to do so nor had had any hearings or investigations of the matter. Furthermore, suppose that a CATV system were planning to construct facilities that would not otherwise be within the regulatory authority of the FCC, *e.g.*, a building housing retransmission equipment and studios for originating programming for the cable system. A suit could contend that the failure to exert regulatory authority over the cable television system, thereby preventing, through extension of that jurisdiction, the construction of the communication facility, was federal inaction amounting to federal action under NEPA.<sup>123</sup> In order to hold that the Commission had acted through inaction the court would have to find that the FCC had jurisdiction over cable television systems and that this jurisdiction extended to prohibit the construction of facilities<sup>124</sup> on the basis of factors not directly related to the performance of a system.

The inaction claim herein hypothesized would clearly implicate the primary jurisdiction of the Commission to first determine its own jurisdic-

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<sup>122</sup>The initials derive from "community antenna television," the earliest form of cable television, when a community in a location with poor reception installed a common antenna—or "big ear"—positioned so that broadcast signals could best be received. Compare the facts in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) with those in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974).

<sup>123</sup>It is a major federal action for the FCC to authorize construction of communication facilities which will affect buildings or sites significant in American history or culture or which will be located in areas recognized for their special scenic or recreational value. 47 C.F.R. § 1.1305(a)(6) (1976). Under the inaction as action theory the failure to prevent construction of such a facility would be just as much a federal action as the authorization of construction of such facility.

<sup>124</sup>The Commission could have exerted its jurisdiction through the mechanism of an adjudicatory proceeding resulting in a cease and desist order, 47 U.S.C. §§ 312(b), (c) (1970), *see, e.g.*, *General Tel. Co. v. FCC*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969), or through an order issued under the broad mandate of 47 U.S.C. § 154(i) (1970). The latter would have the advantage of procedural flexibility, *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178-81 (1968), and its use would presumably have allowed (in the context of the untaken action which would have been postulated by the NEPA reviewing court to find regulatory inaction in this hypothetical case) the FCC to halt construction of the facility pending promulgation of appropriate regulations governing such matters. The FCC could not, of course, have issued any prohibitory order without jurisdiction under the Federal Communications Act to regulate in some manner the activity at issue. For the NEPA reviewing court that is applying the inaction as action doctrine, all that need be concluded is that the agency has some basis in statute for prohibitory regulation of the environmentally affecting activity. That the prohibition not effected could have been accomplished through one mechanism or another would ordinarily not be important, even though one of the mechanisms might have involved a lengthy rulemaking proceeding as a predicate for the agency action of prohibition or other regulation not taken. If the agency, following whatever procedures were required, could have ultimately issued an order prohibiting or otherwise regulating the private activity, under the inaction as action doctrine the agency has "acted" under § 102 of NEPA.

tion.<sup>125</sup> The Commission, in substantial and lengthy proceedings, would have to decide whether it had jurisdiction over cable systems at all,<sup>126</sup> and would also have to deal with the much more difficult issue of what the limits of any such jurisdiction were.<sup>127</sup> Even if the Commission were to find that it lacked the power to prohibit construction of the environmentally-affecting cable television communication facility, and such finding were upheld by the court with the ultimate conclusion being that there was no inaction and therefore no action, the dynamic and fast-changing nature of communications<sup>128</sup> would seem to dictate that the Commission have another go at the complexities of cable television jurisdiction the next time such an inaction claim were made, and the next, and the next. On each occasion of primary jurisdiction reference the Commission would be forced to consider complex issues requiring extensive proceedings.<sup>129</sup> The delay thereby occasioned in the district court's decision on the EIS requirement is undesirable, particularly when that delay could stretch into years. The administrative cost and inconvenience seem far to outweigh any possible environmental benefit.

During the delay occasioned by the reference it may be necessary for the court to issue an injunction to preserve the controversy for ultimate decision.<sup>130</sup> But in granting interim injunctive relief (for what may be a very long

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<sup>125</sup>"Congress has created its instrumentality to regulate broadcasting, has given it pervasive powers, and the Commission has generations of experience and 'feel' for the problem." *United States v. Midwest Video Corp.*, 406 U.S. 649, 676 (1972) (Burger, C.J., concurring in result).

<sup>126</sup>The extended process by which the FCC finally determined that it was possessed of jurisdiction over CATV is set forth in *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 164-66 (1968). In affirming that jurisdiction of the FCC, the Supreme Court in *Southwestern Cable*, emphasized the dynamic and rapidly evolving nature of broadcasting and the broad mandate given by Congress to the Commission to find and assert its regulatory authority over the field. *Id.* at 172-75. The Court relied on the Commission's "reasonab[le] conclu[sion] that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities." *Id.* at 173.

<sup>127</sup>See *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), which dealt with the extension of the FCC's authority to regulate cable television from that which might be considered merely protective of on-the-air broadcasting to the enhancement in the public interest of the services cable television ought to provide the community, in that case program origination, or "cablecasting." The issue of the proper extent of FCC jurisdiction over CATV is still hotly mooted. See *Midwest Video Corp. v. FCC*, No. 76-1496, slip op. (8th Cir., Sept. 12, 1978).

<sup>128</sup>See note 126 *supra*.

<sup>129</sup>In deciding whether it has jurisdiction should the agency prepare an EIS? This EIS would serve a different purpose than the one that would presumably have to be prepared under the inaction as action theory with respect to the particular activity not engaged in at issue if the agency was ultimately to conclude that it had jurisdiction over the activity. The Council on Environmental Quality in its NEPA Guidelines states that "actions" include, *inter alia*: "The making, modification, or establishment of regulations, rules, procedures, and policy." 40 C.F.R. § 1500.5 (3) (1977). In *United States v. Kaiser Aetna*, 408 F. Supp. 42, 55 & n.36 (D. Hawaii 1976) the court held that the determination of the Army Corps of Engineers that a body of water is navigable under the Rivers and Harbors Act of 1899 is not required to be made subject to the preparation of an EIS or the following of other procedures mandated by NEPA.

<sup>130</sup>Remember all those dead wolves; on the other hand, remember all those dead caribou. And as to the impossibility of preserving the environment *status quo* remember the words of the Second Circuit in *Port of New York Auth. v. United States*, 451 F.2d 783, 790 (2d Cir. 1971).

interim) the court would have to conclude that plaintiffs, *i.e.*, those seeking the preparation of an EIS, would likely succeed on the merits.<sup>131</sup> Such a finding, in light of the respect which must be shown the agency by deference to an initial jurisdictional finding by it, and the fundamental importance of the issue of jurisdiction to the agency, is an affront to the position and authority of the administrative agency.<sup>132</sup> Furthermore, the preliminary injunctive relief which would thereby issue forcing the exercise of agency jurisdiction that the court cannot be sure exists, is relief that courts are extremely reluctant to grant even when the jurisdiction to act is clear and the challenge is to the merits of the agency inaction.<sup>133</sup> For all those reasons the inquiry into the jurisdiction of the agency to act, when the issue is in doubt and agency exper-

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<sup>131</sup>*Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>132</sup>That the doctrine of primary jurisdiction may be wrongly and destructively invaded by a reviewing court that issues interim injunctive relief with regard to a matter that is within the special interest and peculiar competence of an administrative agency is forcefully set out by Mr. Justice Marshall in his plurality opinion in *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 821 (1973): "The fact that issuing an injunction may undercut the policies served by the doctrine of primary jurisdiction is therefore an important element to be considered when a federal court contemplates such action."

<sup>133</sup>In *Dunlop v. Bachowski*, 421 U.S. 560 (1975), the Supreme Court held judicially reviewable the decision of the Secretary of Labor upon complaint and after investigation not to file a civil action under 29 U.S.C. § 482(a) and (b) to set aside a challenged labor election. The Secretary must provide a statement of reasons why he did not file the civil action to the court and complainant-plaintiff. 421 U.S. at 571. If the statement is initially insufficient, the Court suggests that the Secretary "be afforded opportunity to supplement his statement." *Id.* at 574. However, if all else fails and the Secretary obstinately clings to a statement of reasons which leads the court to the conclusion that the Secretary's decision is arbitrary and capricious and therefore unlawful, the Supreme Court did not hold that the Secretary may be compelled by the reviewing court to bring suit. The Court explicitly avoids answering the issue, stating instead that such affirmative relief against the Secretary "obviously presents some difficulty in light of the strong evidence that Congress deliberately gave exclusive enforcement authority to the Secretary." *Id.* at 575 (footnote omitted). The Court expresses the hope that the Secretary in those circumstances would act appropriately without judicial coercion. *Id.* at 576. The faith of the Court in the power of shame as an instrument by which courts may work their will is touching, and, as Mr. Justice Rehnquist suggests in dissent, suggestive of the tenuousness of the Court's position with respect to judicial review of the Secretary's decision not to proceed. *Id.* at 597.

In *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972) the court reviewed with undisguised criticism the decision of the SEC not to object to the omission by Dow Chemical Company from its proxy solicitation statements a shareholder proposal seeking an expression of opposition to the manufacture of napalm. The relief granted, as the Medical Committee sought, 432 F.2d at 672, was a remand to the SEC "so that it may reconsider petitioner's claim within the proper limits of its discretionary authority as set forth above" and so that the basis for the SEC's decision could be set forth clearly on the record. *Id.* at 682. A year later the D.C. Circuit reviewed decisions of the Secretary of Agriculture not to issue notices of cancellation and not to summarily suspend with respect to uses of DDT under the Federal Insecticide, Fungicide, and Rodenticide Act. *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971). The court remanded to the Secretary for an articulation of reasons with respect to the decision not to summarily suspend. *Id.* at 596-97. The court did instruct the Secretary to issue notices of cancellation, but only after holding that the Secretary had made findings which compelled the issuance of the notices. *Id.* at 594-95. Furthermore, while a summary suspension, which the court did not order, will protect the public from suspended uses by removing the substance from the market during the pendency of further administrative proceedings, a notice of cancellation alone, which the court did order,

tise is reasonably expected to be of assistance to the court, should not be made in NEPA inaction cases. Since such inquiry is necessary to find that there has been agency inaction the position that agency inaction is action should be rejected in this class of cases.

If the agency's jurisdiction is in doubt but the matter is one which the agency cannot reasonably be expected to illuminate through the exercise of its regulatory experience and expertise, the court before whom the NEPA inaction claim has been raised still ought not engage in the process of determining whether the agency has jurisdiction to act. As an initial matter, if the jurisdiction of the agency is in doubt, the presumption ought to be very strong that the agency will have something helpful and pertinent to say about the matter.<sup>134</sup> This category will, therefore, be rather small and the balancing herein engaged need be rarely performed. Of course, some cases will fall within this category, and the question is what ought to be done about them. The court should not decide the doubtful question of jurisdiction posed in such a case, because a decision that the agency has jurisdiction may only have consequence for the preparation of an EIS. In an effort to clarify this criticism, assume that the court holds that the agency has jurisdiction to act to control or prohibit the environmentally-affecting activity. Under the inaction as action position, the agency will then be compelled to prepare an EIS to inform its decision on whether to continue to act. After taking a hard look at the environmental consequences of its inaction, the agency may decide to continue not acting. Assuming that the court does not grant interim injunctive relief when it orders preparation of the EIS, the agency's jurisdiction, the existence of which is doubtful, *will never be invoked*. Even should interim relief be ordered by the court, the agency will never have chosen to invoke its doubtful jurisdiction on the merits of the issues before it; the court's order will have temporarily and derivatively caused the agency to act and only so far as is necessary to preserve the environmental *status quo ante* (whatever that is<sup>135</sup>) and only so long as is necessary to prepare an EIS. A difficult issue of agency jurisdiction should not be answered by a court when it is of no more consequence than as an ingredient in a quasi-jurisdictional determination in a NEPA inaction case. For a court to decide a doubtful question of jurisdiction in such context would be to upset the delicately tuned relationship between agency and court; it is not the role of courts to advise agencies of those circumstances where some action yet un contemplated might be possible.

In those cases where the courts have placed constraints on agency inaction there was no dispute apparent regarding the jurisdiction of the agency.<sup>136</sup>

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initiates the administrative process without interim relief. *Id.* at 588-89. The Secretary, at the conclusion of the administrative process, issues the final order cancelling or continuing the registration, *id.* at 588; the burden of proof on safety of the product under investigation is on the manufacturer. *Id.* at 593.

<sup>134</sup>See notes 111-14 *supra* & text accompanying.

<sup>135</sup>See *Port of New York Authority v. United States*, 451 F.2d 783, 790 (2d Cir. 1971).

<sup>136</sup>See note 132 *supra* & text accompanying. The Secretary of Agriculture had already made the proper findings to issue the ordered notices of cancellation and was surely empowered to

If the question of jurisdiction of the agency to act were in serious doubt, the courts might not have been as willing to compel action or the reconsideration of inaction through a statement of reasons or otherwise. Add to this the crushing burden on the agency of the EIS preparation and what little possible justification for a court to decide difficult and doubtful questions of agency jurisdiction in a NEPA inaction case disappears.<sup>138</sup>

What ought a court which believes that inaction is action under NEPA do when confronted with a case which falls within the third category outlined above: when the jurisdiction of the agency to act is clear? This is, assuming away all other objections to the inaction as action position, the strongest case for courts to order preparation of an EIS. To accept, though, the application of the inaction as action theory in the case of unassailable agency jurisdiction and not when the jurisdiction is doubtful, requires the court to engage in a preliminary, quasi-jurisdictional analysis as to the clarity or lack thereof of

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summarily suspend the DDT registrations at issue; the SEC could oppose the omission of the shareholder proposal from the proxy statement and could bring suit, if necessary, against Dow Chemical; the Secretary of Labor had full authority to initiate a civil action to overturn the challenged union election.

<sup>137</sup>"Preparation of the EIS is not a project lightly to be undertaken. . . . The volume of litigation involving the adequacy of these statements attests clearly to this fact. . . . NEPA does not intend that the FTC may be indefinitely delayed in undertaking its statutory duties by controversy over an EIS concerning events which may never occur." *Mobil Oil v. FTC*, 562 F.2d 170 (2d Cir. 1977) (emphasis added). In preparing proposals on what land withdrawn under the Alaska Native Claims Settlement Act should be included in the national-interest systems, the Secretary of the Interior filed a Final EIS of 16,800 pages, issued in 28 volumes. *Chamber of Commerce v. Department of Interior*, 10 E.R.C. 1929, 1929-30 (D.D.C. 1977). For an EIS as monumental as that one, one would expect the Franklin Library to bind it in leather and issue one volume a month as part of a Great Environmental Impact Statements of the Ages series.

<sup>138</sup>The general rule is that parties must exhaust their remedies before the administrative agency even when the claim is that the agency is acting outside of its jurisdiction. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). In certain circumstances exhaustion on jurisdictional questions is not required; the Ninth Circuit will weigh three factors: irreparability of injury from the administrative proceedings, involvement of administrative expertise in deciding the jurisdictional issue, and degree of clarity or doubt of the issue. *State of California ex rel. Christensen v. FTC*, 549 F.2d 1321, 1323 (9th Cir. 1977). The cases which dispense with exhaustion and rule on jurisdictional challenges are distinguishable from the NEPA inaction cases on two grounds. First, with regard to the former group of cases "jurisdictional defects . . . are apparent on the face of the record." *Id.* at 1324. The record in such cases comprehends the assertion of agency jurisdiction; the question of jurisdiction is placed in a context which can be dealt with by a court with some facility. Without assertion of jurisdiction by the agency the court must first postulate an agency action and then decide whether the agency has the power to undertake it, an awkward and ungainly process for a reviewing court to engage in. *Cf. Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 492 (1974) (partial preemption of state trade secret law in cases of clearly patentable inventions rejected because, *inter alia*, of burden on state courts of so categorizing a discovery which has not been subjected to the administrative process of obtaining a patent). Second, the irreparable injury faced by those against whom the government intends to move clearly without jurisdiction to so act, is the proper concern of courts in deciding whether to require exhaustion. It is a rather different, and far more serious, matter for a court to authorize the government to act where its authority to do so is doubtful, thereby subjecting persons to the real possibility of government regulation where none may have existed prior thereto. The second category of cases dealt with in this section of the Article falls within the scope of the latter concern.

the agency's jurisdiction to act. The wisdom of imposing yet another layer of judicial inquiry on the already tangled web of inaction as action under NEPA is, at the very least, questionable. Thus, should the first two categories offer inappropriate occasions for application of inaction as action, so should the third and last.

INACTION AS ACTION:  
IMPLICATIONS FOR INDIVIDUAL RIGHTS AND THE ROLE OF COURTS  
IN THE PROTECTION OF SUCH RIGHTS

Federal agencies appear sensitive to the EIS requirement and prepare EIS's before they engage in major actions significantly affecting the environment and before they affirmatively aid private parties who act similarly. Assuredly there will be more cases exploring the boundaries of what constitutes an action which significantly affects the environment and at what point the federal agency crosses the line in support of a project to federalize it for purposes of section 102. Yet, the "growth industry"—if there is to be one—in EIS litigation must be found elsewhere. It is likely that the environmentalists and the courts will turn to the theory that federal inaction is federal action and that an EIS must be prepared before the federal inaction can be permitted to continue.

The environmentalists cannot be blamed for seeking new avenues for effective redress of their grievances. There is no reason to begrudge them the opportunity to put their claims before the courts in a new context.<sup>139</sup> The courts, on the other hand, are to blame for accepting inaction as action under NEPA. The inaction as action theory fights the plain meaning of section 102, and creates difficult, at the least, problems for the courts which will try to apply the theory.<sup>140</sup> Why do they then adopt it? Protecting the environment is thought a worthy task, and judges apparently see themselves in the

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<sup>139</sup>It is not always clear, however, whether government inaction is worse than government action for the environment. Section 102 restricts the government from acting and places upon the government and those who support government action the burden to come forth and place the environmental case before the agency decisionmaker and the public. The question may be close as to whether action or inaction by the agency would better serve the cause of the environment, and it would be more than possible if inaction as action gains popularity to see environmentalists on both sides of the issue. Courts heretofore insulated from environmental choices under NEPA by the presumption against government action would have to take sides between opposing "good intentioned" environmental advocates. By hypothesis the court would not be facing the "easy" choice between parking lot paver and lover of green grass. The environmentalists cannot relish the tensions placed on their movement by fighting inaction versus action on the field of battle supplied by the federal court system.

<sup>140</sup>This article does not cover all the problems that may arise with respect to the inaction as action theory. One that remains to be explored is the consequence of turning NEPA on its head: the courts have fashioned the EIS to deal with the "institutional bias" that an agency will have in favor of the action it proposes to engage in. *Environmental Defense Fund v. Corps of Eng'rs*, 470 F.2d 289, 295 (8th Cir. 1972). The procedural requirements of § 102 that have held that agency back are now supposed to force the agency to exert itself and act without delay. That is too much to ask even of NEPA.

forefront of the movement to save our land from environmental rape and pillage.<sup>141</sup> In order not to lose this opportunity to serve when the agencies at last have begun to behave themselves and prepare the EIS when they ought to, requires imagination and a certain sense of mission. It takes both to devise the theory that federal inaction is action.

The courts, though, should take great care to examine the underlying premises of the inaction as action doctrine, and understand the consequences of adopting it. The theory of inaction as action is, once again, that when the federal government does not act to invoke its enforcement powers to regulate a private activity which significantly affects the environment, the government is acting and must prepare an environmental impact statement before it continues not to act. Thus, the private activity is really governmental activity, because the activity is one that the government allows to take place: the acts are engaged in by private parties only by sufferance, by gracious permission, of the government. But the tradition of the Nation is one of limited government, one which rejects the philosophy that starts with government and sees the individual sphere as only that which the government has, for the time being, surrendered.

Inaction as action cannot be justified as an environmentally-based exception to settled notions of the citizen's relationship to the State. It cannot because the environmental effect of the actions of the individual is infinitely expandable; everything everyone does has an environmental consequence, something the courts have well taught us through their application of section 102 of NEPA to governmental activity. Furthermore, the implications of the inaction as action theory are so powerfully disruptive to our settled notions of government, that inaction as action cannot be treated merely as a NEPA aberration.

The reply to the inaction as action doctrine is that the people came first, not the State. And the people may act unless and until the State forbids such action.<sup>142</sup> The source of governmental power in the United States is the consent of those who live within its boundaries; the reverse is not the case: the source of the power of the governed is not the government, nor has it ever been. The natural course of events is for the government to not regulate, to not enforce, to not interfere in the normal progress of our lives. If the State is responsible for anything, it is responsible for affirmative acts of its own of regulation, enforcement and interference. Where a need for regulation is perceived the State may certainly act and attempt to right the wrongs.<sup>143</sup> The

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<sup>141</sup>For a particularly self-congratulatory look at the federal judiciary's role in protecting American from environmental degradation, see Judge James L. Oakes' article, *The Judicial Role in Environmental Law*, 52 N.Y.U. L. REV. 498 (1977).

<sup>142</sup>See, e.g., U.S. CONST. amends. IX, X. These amendments, of course, merely state the obvious truth that our government is one of limited powers and powers which emanate from the consent of the governed. The ninth amendment speaks pointedly of rights "retained by the people."

<sup>143</sup>The Congress has enacted the Clean Air Act, 42 U.S.C. §§ 1857-1857 l (1970 & Supp. V 1975), the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-1175 (1970 & Supp. V 1975),

rejection of inaction as action preserves this dichotomy between citizen and State and forces renewed understanding of the source of human action—the individual himself.<sup>144</sup>

Mr. Justice Stevens expressed in far more eloquent language the halting sentiments of individual autonomy and source of rights set forth above, in his dissent in *Meachum v. Fano*.<sup>145</sup> The Supreme Court in that case held that a state prisoner was not denied liberty without due process of the law under the fourteenth amendment when he was transferred to a less desirable prison. Mr. Justice Stevens read the majority to state that a liberty interest to be protected under the fourteenth amendment had only two sources: the Constitution or state law. He went on to write:

If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.<sup>146</sup>

Unless our rights exist apart from the State they exist not at all, for what the State confers, the State can take away. The courts stand as the final bulwark for the protection of our rights, and it may appear that so long as those rights are properly safeguarded all is well. If, though, the source of those rights is the State, the courts stand in an unusually exalted position: the rights they enforce are no more than the candy that shall be bestowed by judges as benevolent agents of the State to the populace hungry for a taste of freedom. But there is no guarantee that the judges may not one day, drunk with power that flows from the philosophy that the State is the source of rights and liberties, decide not to suffer our riot any longer. What then? What happens when the judges find our freedoms tiresome and their exercise wasteful? Ask the U.S. Court of Appeals for the District of Columbia, a majority of whose judges sitting *en banc* orated as one, *i.e.*, *per curiam*, with respect to the electoral process: "We have not been sufficiently vigilant; we have failed to remind ourselves, as we moved from the town halls to today's

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the Noise Control Act, 42 U.S.C. § 1858, 1858a (1970), and the Resource Recovery Act, 42 U.S.C. §§ 3251-3254f, 3256-3259 (1970 & Supp. V 1975). The National Park System is also the result of positive federal action.

<sup>144</sup>I do not, of course, mean to exclude the role of the Transcendent.

<sup>145</sup>427 U.S. 215 (1976).

<sup>146</sup>*Id.* at 230.



quadrennial Romanesque political extravagances, that politics is neither an end in itself nor a means for subverting the will of the people."<sup>147</sup> Perhaps one day the courts will grow weary of a free press; the free speech exemplified there is, after all, only guaranteed by the State. Under the inaction as action view, the free press suffered by the State is no different from the press licensed by the State.<sup>148</sup>

There is another consequence to be feared from the adoption of the inaction as action doctrine, one certainly less finally apocalyptic than the one described immediately above but also far more likely. As noted above<sup>149</sup> courts seldom review federal agency nonenforcement and nonregulation, and even more rarely compel an agency to enforce or regulate. Inaction as action offers courts that chafe under such restrictions the enticing possibility of forcing government agencies to regulate, if only on an interim basis, that is, until the EIS is prepared and the agency has an opportunity to make an informed decision on whether to continue not to act.<sup>150</sup> There is every good reason to deny the federal courts this power.

While it may be true that in not enforcing or prosecuting, federal agencies are abusing their power and making arbitrary decisions which would not withstand the rigors of judicial review if they had produced enforcement or prosecution,<sup>151</sup> there are ways to deal with the problem other than by use of the courts to mandate enforcement by the federal government against private parties. If the unlawfulness of the government determination not to prosecute derives from discriminatory enforcement, the obvious solution is to stop the discrimination at the source and have the courts void efforts to enforce. That unlawfully discriminatory enforcement is rarely found by courts may reflect problems with the theory that government is irrationally determined to prosecute only those, to use a favorite example, with blue eyes. If the test for discriminatory enforcement is too lenient, the courts can alter it to fit a more modern view of federal agency enforcement policy, or non-policy, and apply the new test to void even more prosecutions and enforcement actions. To accomplish non-discrimination the courts do not have to force the federal agencies to enforce or prosecute.

If the claim is not one of discrimination, but simply of an agency neglect of what regulatory enforcement policy ought to be, there is no basis for the

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<sup>147</sup>*Buckley v. Valeo*, 519 F.2d 821, 897 (1975). The contempt for the people therein evinced was not shared by the Supreme Court which reversed in part and affirmed in part. 424 U.S. 1 (1976).

<sup>148</sup>At the appropriate time then *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) will collapse into *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

<sup>149</sup>See note 133 *supra* & text accompanying.

<sup>150</sup>By contrast, the injunction regularly granted in NEPA cases to restrain the government from acting is no more than an expression of the usual role that courts have in reviewing agency action and restraining the government from unlawfully proceeding. There is nothing particularly extraordinary about setting down a reason to proscribe agency action. The natural function of section 102 of NEPA is to make it more difficult for the federal government to do things.

<sup>151</sup>See *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 673 & nn.13 & 14. See also K. DAVIS, *ADMINISTRATIVE LAW* Ch. 23.

courts to control agency policy affirmatively, compelling enforcement, or prohibitively, by voiding enforcement. The Supreme Court long ago recognized the principle of scarcity as applied to agency enforcement resources: "Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically."<sup>152</sup> Evil, as well as beauty, is in the eye of the beholder.

Apart from the likelihood that compelling federal enforcement action will infringe on the proper scope of agency freedom to order regulatory priorities, there is another, more serious objection to courts compelling agency enforcement: that by so doing the courts surrender their position, precious to continued public acceptance of the special role of the judiciary in our federal system, as umpire, dispassionate and fair in judgment, and as the final hope for those who seek protection from the onslaught of government power and, through its exertion in a particular case, claimed oppression. When a court goes beyond passing upon the legality of government enforcement action, and itself forces the government to act—even temporarily<sup>153</sup>—the court has assumed the role of prosecutor as well as judge. A court is unlikely to hold unlawful the exercise of governmental enforcement power it has commanded. Therein lies the threat to the perception by citizens subject or potentially subject to federal enforcement efforts that justice may be had in the federal courts, and the threat to that justice.

### CONCLUSION

The inaction as action doctrine has a certain immediate attractiveness: why not have the federal government prepare environmental impact statements before it determines not to use its power to prevent harm to the ecosystem? After all, NEPA states its broad policy goals in ringing terms: it is the "policy and responsibility of the Federal Government to use all practicable means" to assure environmental use without degradation, and to preserve and enhance our environmental, cultural, and historical heritage.<sup>154</sup> So long as section 102 can be employed to foster such "lofty purposes"<sup>155</sup> it arguably should, and one way section 102 can be so used is to force the federal government to examine through EIS preparation the consequences of its regulatory inaction in the face of action by private parties which might significantly affect the environment.

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<sup>152</sup>*Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958).

<sup>153</sup>And "temporarily" for the preparation of an EIS can seem, if not be, a lifetime.

<sup>154</sup>42 U.S.C. § 4320 (1970).

<sup>155</sup>*Student Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 693 (1973). "[NEPA] is a commitment to the preservation of our natural environment." *Id.* at 331 (Douglas, J., dissenting in part).

If private parties are currently harming the environment in ways that are not regulated and that are matters of public concern and ought to be subject to federal control, the plea should be directed to Congress and new efforts should be made to obtain therefrom the desired legislation. Section 102 of NEPA cannot serve as the vehicle to solve the problem (if it exists) that the federal government does too little with regard to environmental quality; the EIS requirement is a constraint on the federal government, not a prod to more governmental action. As this Article has argued, to place the EIS requirement on federal *inaction* is not only to reject the purpose and plain meaning of section 102, but also to force courts to make arbitrary decisions on the basis of an environmental record that would be legally insufficient for an agency to rely on, and, furthermore, to place intolerable strains on the relationship between agency and court. Finally, and most disturbing, the inaction as action doctrine adopts as an underlying premise the notion that the State is implicated in every action by an individual. The consequences of such a position for the continued enjoyment of the rights and liberties we as citizens of the United States hold so dear, are so serious that great pause should precede any further embrace by the courts of the inaction as action doctrine.